Supreme Court, U.S.
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No._____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

JAMES CUDA AND JOHN CUDA
Petitioners,

vs.

UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the phrase "affecting such bank" modifies the phrase "any larceny" in 18 U.S.C. § 2113(a).

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Fifth Circuit, entered on July 7, 1995.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, Case No. 94-40675, was not published. (Appendix)

JURISDICTION

Jurisdiction of this Court is invoked pursuant to Title 28 United States Code, Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involved 18 U.S.C. §2113(a) and (b) which provide:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and

loan association or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of the statute of the United States, or any larceny --

Shall be fined under this title or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

STATEMENT OF THE CASE AND FACTS

Petitioners, John and James Cuda, were arrested by the Beaumont Police Department on May 6, 1993. They were ultimately indicted on charges of mail fraud, bank larceny, and conspiracy to commit bank larceny. The facts concerning the bank larceny are the following:

On May 6, 1993 Fay Shavers was working at Texas Commerce Bank in Beaumont, Texas, a bank she believed was insured by Federal Deposit Insurance Corporation. Cora Dickson, an elderly widow in her late 70's or early 80's with whom Ms. Shavers had dealt previously, entered the bank with a gentleman. Ms. Shavers identified the gentleman as John Cuda. Mr. Cuda told her Mrs. Dickson wanted to close her accounts and laid Mrs. Dickson's statements on the desk. Mrs. Dickson had $98,000.00 in a jumbo Certificate of Deposit which Mr. Cuda requested be cashed out and a cashier's check made to Home Equity.

Ms. Shavers told them that they would have to the Gateway branch. She then got the license plate number from the vehicle and called the police. She was told the vehicle was a rental and to call the Gateway branch to stall until the police could get there. Ms. Shavers called the Gateway branch and asked them to stall. Mrs. Dickson left the bank with one gentleman and there was another person driving.

Ms. Shavers testified Mrs. Dickson had the legal authority to withdraw her own money and Ms. Shavers had never contacted the bank attorneys regarding her competency. Mrs. Dickson did not have a guardian. She continued to write checks and close accounts and no one ever tried to prevent her from conducting business. Mrs. Dickson was receiving 3.15% interest on her certificate. Ms. Shavers knew nothing about Home Equity.

Johnnie Foret was a new accounts

executive at the Gateway branch of Texas Commerce Bank. On May 6, 1993 she received a call from Fay Shavers who was suspicious of the gentleman with Mrs. Dickson. Mrs. Dickson and a gentleman she identified as John Cuda walked up to her desk. Mr. Cuda handed her a bank statement and said he and Mrs. Dickson wanted to take out $100,000.00 and a certified check made out to Home Equity. Ms. Foret approached the branch president who told her to stall. Ms. Foret continued processing the transaction. There was no reason Mrs. Dickson couldn't withdraw her money. The cashier's check would not have been made out to Home Equity. It would have to be made to Mrs. Dickson.

During the transaction, Officer Owens of the Beaumont Police Department arrived at the Gateway Branch. Officer Owens was allowed to testify over objection that he observed a vehicle matching the description in his dispatch parked in a "getaway" position. He approached the vehicle and asked for identification. He was handed a Nevada Driver's license in the name of James Cuda, who he identified in the courtroom. James Cuda told the Officer he was waiting for his partner and a client to conduct some business.

Officer Owens went into the bank and asked John Cuda to step outside and show identification. John Cuda told the officer he represented Home Equity Real Estate Company and showed the officer some forms showing a money term venture. One form was a response form signed by Cora Dickson stating she would like to participate in the Home Equity Consulting Group Loan. Ms. Dickson had filled in her Social Security Number and the date of May 6, 1993. Another form was a closing protection letter which made the officer suspicious because the name was spelled "Couda", not "Cuda". The officer conducted no investigation regarding the validity of Home

Equity.

Trial began April 5, 1994 and concluded April 11, 1994. Petitioners were found guilty on all three counts: mail fraud, bank larceny, and conspiracy to commit bank larceny. Petitioners were sentenced on July 7, 1994. Petitioners appealed to the Fifth Circuit Court of Appeals which entered its opinion on July 7, 1995. (Appendix)

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEALS.

THE FIFTH CIRCUIT RULING THAT A LARCENY COMMITTED IN A BANK DOES NOT HAVE TO AFFECT THE BANK IS AN IMPORTANT QUESTION OF FEDERAL LAW.

The Fifth Circuit Court of Appeals found that the phrase "affecting such bank" in Section 2113(a) does not modify the phrase "any larceny". Accordingly, the court did not explicitly analyze whether the Cudas' actions "affected" the bank. (Appendix n.2). The Court of Appeals reached this conclusion without further discussion.

The Fifth Circuit's opinion not only conflicts with this Court's ruling in Jerome v. United States, 318 U.S. 101, 87 L.Ed. 640, 63 S.Ct. 483 (1943) but also conflicts with decisions of the Courts of Appeals for the Second and Seventh Circuits. United States v. Shandell, 800 F.2d 322 (2nd Cir. 1986);United States v. Kucik, 844 F.2d 493 (7th Cir. 1988); United States v. Wright, 365 F.2d 135 (7th Cir. 1966). If the Fifth Circuit court's opinion were correct, a pickpocket could be prosecuted federally if he happened to be in a federal bank. The opinion would lead to ridiculous results, and is a question of great importance.

In Jerome, the Court of Appeals held that the word "felony" in the federal statute included offenses which were felonies under state law. This Court stated that since the double jeopardy provision of the Fifth Amendment does not stand as a bar to federal prosecution though a state conviction based on the same acts has already been obtained:

> [t]hat consideration gives additional weight to the view that where Congress is creating offenses which duplicate or build upon state law, courts should be reluctant to expand the defined offenses beyond the clear requirements of the terms of the statute.

Jerome, 318 U.S. at 105. This Court also stated that the phrase "any felony " could not be interpreted as making state felonies into federal offenses. Id.

Likewise, the phrase "any larceny" in §2113(a) cannot be interpreted as making a state larceny into a federal offense. This is precisely what the Fifth Circuit tried to do by holding that a larceny does not have to "affect" a federal bank to be a federal offense. This interpretation runs afoul of this Court's warning that a violation of state law being considered a federal offense cannot be left to implication and conjecture. Jerome, 318 U.S. at 106. For example, state offenses on federal land are specifically included as federal offenses. Criminal Code §389, 18 U.S.C.A. §468. In concluding, this Court held that the statute should be interpreted to exclude state felonies and to include only those federal felonies which "affect" the banks protected by the Act. Jerome, 318 U.S. at 108.

This Court recently addressed the dichotomy of power between State and Federal sovereigns. United States v. Lopez, 8 Fla. L. Weekly Fed. S752 (April 26, 1995). In that opinion, this Court recognized that states possess the primary authority on defining and enforcing the criminal law. Lopez, n.3.

By finding the larceny does not have to "affect" the bank the Fifth Circuit improperly federalized a state offense. The opinion clearly states that intent, if any, was to

commit a larceny upon Mrs. Dickson (Appendix). The Cudas had no intent to steal from the bank nor was the bank in any way affected.

The Fifth Circuit opinion conflicts with other courts of appeals.

In United States v. Shandell, 800 F.2d 322 (2nd Cir. 1986) the Court addressed the question presented here and found that the bank was "affected" since it was subject to suit for falsely warranting the signatures of prior endorsers and its own good title. Therefore, the Defendants' "larcenous conduct clearly affected" the bank. Shandell at 324. In Shandell the appellant had argued that the limiting language "affecting such bank" applied not only to "any felony" but also to "any larceny". Shandell relied on United States v. Wright, 365 F.2d 135 (7th Cir. 1966) which addressed the issue presented in this petition for writ of certiorari. In Wright, the appellant claimed that Section 2113(a) was unconstitutional and beyond Congress' legislative authority because the "affecting any bank" limitation was placed on "any felony" but not on "any larceny". The Seventh Circuit held that the limitation inserted as to "any felony" was equally applicable to "any larceny". Wright at 138. The Fifth Circuit has interpreted Section 2113(a) exactly the opposite of the Seventh Circuit.

Shandell assumed, without deciding, that Wright was correct, but noted that the issue was open to debate, citing Jones v. United States, 419 F.2d 515 (8th Cir. 1969) and Smith v. United States, 356 F.2d 868 (8th Cir. 1966). Shandell at 324.

In Jones the petitioner claimed Section 2113(a) was unconstitutional because it made a federal offense of "any larceny" committed in a federal bank. The Eighth Circuit held that Jerome was not on point since Jerome did not make constitutional determinations, but rather construed "any felony" to mean only felonies

already proscribed under federal law and affecting banks protected by the Act. Jones at 517 (emphases added). In Jones, the court found that since the defendants had burglarized the bank, their actions clearly fell within the statute.

Jones relied on Smith, the other case cited in Shandell. Smith involved several constitutional challenges to Section 2113(a). One of the challenges was that the limitations placed on "felony" was not placed on "larceny", and the latter could be a violation of common or state law. Citing Jerome, the court noted that this Court had previously held that "felony" embraces only offenses which are felonies under federal law and affect banks protected by the Act. Smith at 870 (emphasis added). The Eighth Circuit concluded that Jerome stands for the proposition that any larceny from a bank within the federal banking system was covered by the Act and was a federal offense. "Any" larceny meant taking anything from a bank, whether it was a ballpoint pen or a check protector. "Any" larceny did not include a common law or state larceny.

In United States v. Clark, 776 F.2d 623, 625 (7th Cir. 1984) the Court stated that:

> The offense is entry into the bank with the intent to unlawfully take and carry away the property of the bank and deprive such bank of the ownership, possession, use, and benefits or to appropriate the money wrongfully. (emphasis supplied)

In the present case, if Appellants had intended to deprive Cora Dickson of her money this would be a state felony. The fact that it happened in a federally insured bank does not make it a federal felony. In Clark the defendant entered the bank and attempted to

deprive the bank of funds. In the present case, if there were any such intent, the only person affected was Cora Dickson. The bank was not affected since funds would have been rightfully transferred to Mrs. Dickson and any taking would be from her, not from the bank. This is confirmed by the fact the bank could only issue a check to Mrs. Dickson.

In United States v. Kucik, 844 F.2d 493 (7th Cir. 1988) the Defendant deprived a non-federal credit union of money through a check-kiting scheme. The court conducted an exhaustive analysis into whether the bank which was federally insured was affected. Ultimately, the Court found the bank was affected; however, this case illustrates how in the present case the intent must be to deprive the bank of something of value and the bank must be affected in some way. In the present case the bank was not affected in any way whatsoever. Even if the funds had been transferred to Cora Dickson and were taken from her, the bank was in no way liable.

By holding that "affecting any bank" does not modify or limit "any larceny" the Fifth Circuit has created conflict among the Circuit Courts of Appeals. Furthermore, it has now federalized state offenses committed in a federal bank whether or not the bank is affected.

The question presented is an important question of federal law. If the decision of the Fifth Circuit were to stand, it would broaden the scope of Section 2113(a) to include state offenses, make state larcenies federal offenses, and invade the province of the states to define and enforce state offenses.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request this Court issue a Writ of Certiorari to the Fifth Circuit Court of Appeals and order a full briefing and argument on the questions raised herein.

Respectfully submitted,
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APPENDIX

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United States v. Cuda
Case No. 94-40675 (5th Cir. July 7, 1995)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40675
Filed July 7, 1995

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VERSUS

JOHN AURELIO CUDA and JAMES RICHARD CUDA
Defendants-Appellants.

Appeal from the United States District Court
For the Eastern District of Texas

Before DAVIS, SMITH, and WIENER,
Circuit Judges
JERRY E. SMITH, Circuit Judge:*[1]

OPINION OF THE COURT

John Aurelio Cuda and James Richard Cuda appeal their convictions, after a jury trial, of mail fraud, bank larceny, and conspiracy to commit bank larceny. They raise numerous issues, the most significant being the existence of probable cause to arrest, an alleged violation of the Speedy Trial Act, and

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[1]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principals of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

the application of the amended Bank Robbery Act of 1934, 18 U.S.C. § 2113. They also challenge several evidentiary rulings, the sufficiency of the evidence on all counts, and the enhancement of their sentences. Because we find that the officers had probable cause, the addition of a corporate defendant extended the time of the running of the Speedy Trial clock, the Bank Robbery Act covers the Cudas' conduct, and the other arguments are meritless, we affirm.

I.

James and John Cuda preyed on the elderly. Their modus operandi was to buy lists of people who responded to mailings such as sweepstakes entries and then contact them by mail or phone with "investment" opportunities that offered too-good-to-be-true returns and were run by shell corporations. While the deals wore the veneer of respectability, they inevitably failed, leaving their investors with large losses. Typically the Cudas targeted the elderly, persons often with large amounts of cash to invest and limited ability to protect themselves.

The Cudas' latest machinations came to a close on May 6, 1993, when Beaumont police arrested them after they had attempted to assist an octogenarian close an approximately $100,000 account at a local bank. Bank employees had become suspicious after John Cuda, accompanied by an elderly woman, Mrs. Dickson, had asked that Mrs. Dickson's account be closed and a cashier's check be made out to Home Equity Consulting group ("Home Equity"). Believing that the somewhat feeble-minded woman, whom they knew well, was being swindled, the employees called the police.

The police, after a short investigation, arrested John Cuda, when they determined the elderly woman did not appear competent. They also arrested James Cuda, who had been waiting

in a car outside the bank. They impounded the Cudas' vehicle and seized two briefcases, which contained, along with other documentary evidence detailing the Cudas' business dealings, a lead sheet on Mrs. Dickson that stated "Thursday go see," "Jumbo CD $100,000," and "Talk Texan to her."

After arresting the Cudas, the police contacted the FBI, which in turn discovered that the Cudas were connected with four fraud cases in California. Further investigations revealed that James had been arrested in Florida for defrauding an elderly woman but that those charges had been dismissed, as the state statute under which James had been charged was declared unconstitutionally vague. See Cuda v. State, 639 So.2d 22 (Fla. 1994).

Because of the interstate nature of these activities, a federal indictment was sought. The Cudas were charged with mail fraud, 18 U.S.C. § 1341, bank larceny, 18 U.S.C. § 2113(a), and conspiracy to commit bank larceny, 18 U.S.C. § 371. The scope of the indictment covered not only the Cudas' dealings in Texas, but also those in Florida and California. Two of their corporations, Rancho Santa Fe Developing Corporation and Home Equity, were also charged in superseding indictments.

At trial, the government's proof consisted primarily of documents concerning the Cudas' corporate "family" and the testimony of and about several people who had lost money in ventures with the Cudas. The theory of the government's case was that the Cudas were frauds; they, in part using the U. S. mail, had swindled numerous elderly victims by convincing them to invest in sham ventures; and the Cudas had attempted to do the same to Mrs. Dickson, thus committing bank larceny. The Cudas' defense was that their businesses were legitimate, their investments sound, and they relied in good faith upon professionals

in the field. Losses, if any, were caused by a downturn in the California real estate market. Their deal with Mrs. Dickson was the same. The jury returned a guilty verdict on all counts.

II.

The Cudas first contend that their initial arrest was a violation of their Fourth Amendment rights, as they argue that the police lacked probable cause to believe that a crime was being committed. Our review of such claims is well established. Probable cause to arrest "exists when the facts and circumstances within the knowledge of the arresting officer are sufficient to cause a person of reasonable caution to believe that an offense has been or is being committed." United States v. Rocha, 916 F.2d 219, 238 (5th Cir. 1990), cert. denied, 500 U. S. 934 (1991); see also Beck v. Ohio, 379 U. S. 89, 91 (1964). While the existence of probable cause is a question of law, reviewed de novo, United States v. Hernandez, 825 F.2d 846, 849 (5th Cir. 1987), cert. denied, 484 U. S. 1068 (1988), we view the evidence in the light most favorable to the prevailing party. United States v. Ponce, 8 F.3d 989, 995 (5th Cir. 1993).

Here, the police were responding to a call from bank personnel who were familiar with Mrs. Dickson's feeblemindedness. The police thus knew that Mrs. Dickson was of questionable mental competence and that a stranger was "assisting" her in making a large withdrawal from her account. Their independent investigation confirmed these facts.

Testifying at trial, the police officer, who talked to Mrs. Dickson at the bank, politely described her demeanor as "confused." The investigation also revealed that the Cudas were from out of state and were promoting large investment opportunities through the

mail and that some of the documentation misspelled John Cuda's name. Indeed, one form letter that John Cuda showed the police stated that Mrs. Dickson was giving Home Equity a check for $1,000,000. That letter was signed by Mrs Dickson and dated May 6, the day of the arrest. Finally, an officer testified that James Cuda was waiting outside the bank in a rental car, parked in a "get-away position."

While we do not stress any one of these facts, we find, under these circumstances, that the police had probable cause. In the totality of the circumstances and judged from the point-of-view of an experienced officer in the field, these facts would lead a reasonable person to believe that the Cudas were attempting to defraud Mrs. Dickson.

III.

The Cudas complain that the government failed to bring them to trial within the time limits set forth in the Speedy Trial Act, 18 U.S.C. §§ 3161-74. Specifically, they contend that the government exceeded its seventy-day limit by indicting them on May 19, 1993, and not bringing them to trial until April 5, 1994. Our review of speedy trial issues necessarily requires a careful analysis of both the total time period and the days excludable under the Act. Moreover, "[w]e review the facts supporting a Speedy Trial Act ruling using the clearly erroneous standard and the legal conclusions de novo." United States v. Bermea, 30 F.3d 1539, 1566 (5th Cir. 1994), cert. denied, 115 S.Ct. 1113 (1995).

The correct computation of the speedy trial clock here depends upon the application of 18 U.S.C. § 3161(h)(7), which allows an exclusion of "[a] reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted." The Supreme Court, in a footnote,

has interpreted this section to mean that "[a]ll defendants who are joined for trial generally fall within the speedy trial computation of the latest codefendant." Henderson v. United States, 476 U.S. 321, 323 n.2 (1986). We have adopted this rule, albeit first in a footnote, see United States v. Welch, 810 F.2d 485, 488 n.1 (5th Cir.), cert. denied, 484 U.S. 955 (1987), but latter more explicitly, see Burmea, 30 F.3d at 1567. Accord United States v. Jones, No. 94-10091, 1995 U. S. App. LEXIS 14591, at *4 n.4 (5th Cir. June 14, 1995) (citing Bermea, 30 F.3d at 1567).

Under this rule, no speedy trial violation occurred. While the government concedes that the seventy-day deadline would have ended on August 1, 1993, the indictment was dismissed two days earlier. This event stopped the clock. § 3161(h)(6). Seventeen days later, the government reindicted the Cudas and added two new defendants, which were corporations controlled by them. At this point, the allowable time period for the set of defendants became seventy days. As the bulk of time between August 1993 and July 1994 was excluded because of pending motions, see § 3161(h)(1)(F), the clock was further told and did not run over the limit. See Jones, 1995 U.S. App. LEXIS 14591, at *4. In sum, as the accepted rule is that the time for all codefendants is measured by the last defendant whose time will run out, the government avoided violating the Act by adding the new defendants.

IV.

The Cudas argue that the evidence was insufficient as a matter of law to support their convictions on all three counts. We have carefully reviewed the record and disagree. Under our deferential standard of review--examining the evidence in the light most favorable to the verdict and upholding

the conviction if a rational trier of fact could have found the essential elements of the offenses beyond reasonable doubt--we find the evidence on the mail fraud and the conspiracy to commit bank larceny counts was more than sufficient. See United States v. Cardenas-Alvarez, 987 F.2d 1129, 1131 (5th Cir. 1993). As the question of the proper application of the bank larceny statute, however, presents a closer question, we review that analysis in some detail.

The amended Bank Robbery Act of 1934 provides, in relevant part, that

> [w]hoever enters or attempts to enter any bank . . . with the intent to commit in such bank . . . any felony affecting such bank . . . and in violation of any statute of the United States, or any larceny shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 2113(a) (emphasis added). This entry was "inserted in the statute to cover the situation where a person enters the bank for purpose of committing a crime, but is frustrated for some reason before completing the crime." Prince v. United States, 352 U.S. 322, 328 (1957). Therefore, the "heart of the crime is the intent to steal." Id. The Cudas were indicted under this subsection.

Successful larceny is also made an explicit crime under the Act, albeit under a different subsection. Section 2113(b), in part, provides:

> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan

> association shall be fined under this title or imprisoned not more than ten years, or both.

That subsection proscribes not only the common-law definition of larceny but also the crime of false pretenses. Bell v. United States, 462 U.S. 356, 361 (1983). False pretenses is defined as where "a thief, through his trickery, acquired title to the property from the owner." Id. at 359. Of significance here is that in a prior case, Jerome v. United States, 318 U. S. 101, 103-04 & n.4 (1943), the Court indicated that the word "larceny" in 3112(a) [sic] refers to the criminal acts proscribed by § 3112(b)[sic]. See also United States v. Clark, 776 F.2d 623, 626 (7th Cir. 1984) (holding that § 2113(a) incorporates definition of larceny in § 2113(b), cert. denied, 470 U. S. 1006 (1985); United States v. Registe, 766 F.2d 408, 410 (5th Cir. 1985) (holding that § 2113(a) covers larceny by false pretenses).

Accordingly, even though Cuda's plan was unsuccessful, and he did not "take[] and carr[y] away" the money as required by the test of § 2113(B), section 2113(a) still reaches his conduct. John Cuda's actions at the Beaumont bank constitute an attempt to commit larceny by false pretenses and thus satisfies the definition of larceny under § 2113(a) and (b).[2] He misrepresented to the

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[2]The crime defined by § 2113(a), however, is technically not attempted larceny. To read the statute so represents the incongruous result that a successful larcenist facts a 10-year sentence under § 2113(b), while the unsuccessful larcenist facts a 20-year maximum sentence under § 2113(a). Instead, the distinguishing characteristic between the two sections is that § 2113(a) requires a showing

bank officials that Mrs. Dickson wanted to withdraw significant funds and that the check should be made payable to Home Equity. As the bank officials discovered, however, Mrs. Dickson had no such specific intent and did not understand the transaction she allegedly was requesting. In that situation, Mrs. Dickson's presence did not make Cuda's pretenses true, but rather was the very trick he was using to mislead the bank into giving him the money.

Moreover, the government's evidence and Cuda's past conduct more than support the inference that they intended to commit such a larceny upon Mrs. Dickson before entering the bank. It is uncontroverted that John Cuda's actions were within a bank.[3]

V.

Finally, the Cudas raise numerous evidentiary objections. They protest that the district court improperly admitted extrinsic offense testimony of other people who lost money by investing with the Cudas. As the jury found, however, the frauds about which the victims testified were part of a single mail fraud scheme. Therefore, that testimony is not extrinsic, but rather is admissible as direct evidence of the unitary scheme.

The Cudas also object to the testimony of Paul Gonzales, a former news reporter. In 1985, Gonzales had gone undercover to

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of an improper intent before entering the bank, while 2113(b) does not. See Robinson v. United States Bd. of Parole, 403 F. Supp. 638, 642 (W.D.N.Y. 1975)

[3]Under the plain language of § 2113(a), the phrase "affecting such bank" does not modify the phrase "any larceny." Accordingly, we do not explicitly analyze whether the Cudas' actions "affected" the bank.

investigate "boiler room" operations that offered scam investments in commodity futures. His employers were the Cudas. The government concedes that Gonzales's testimony is extrinsic but responds that it is admissible nonetheless to show the Cudas' fraudulent intent, see FED. R. EVID. 404(b), and that its probative value was not substantially outweighed by its prejudicial effect. We agree.

The Cudas also complain that much of the victim's testimony is inadmissible hearsay. The Cudas argue that Diane Wooten, the daughter of one victim, had no personal knowledge of her mother's financial dealings, and her testimony regarding those dealings was inadmissible hearsay. As this evidence was merely cumulative of the testimony of other victims, however, we find that any hearsay contained in her testimony was harmless. See FED. R. EVID. P. 52(a).

The testimony of Glen Norris, an economic crimes investigator for the State of Florida, was based upon either admissible documents under the business records exception, FED. R. EVID. 803(6), or opinion evidence of an expert witness in the area of economic crimes. Nor did the district court abuse its discretion in allowing Norris to testify about various missives between James Cuda and one victim, and several promissory notes and deeds. These documents were not admitted to prove the truth of the matters asserted, but to show the victim's relationship with James Cuda and demonstrate their misleading nature.

The Cudas object to the fact that a bank teller was permitted to give her opinion of Mrs. Dickson's mental state. As this witness had regular dealings with her, such testimony was properly admitted as lay opinion evidence under FED. R. EVID. 601 and 701. The Cudas argue that the district court abused its discretion in denying their motion to have

Mrs. Dickson examined by a psychiatrist, especially as the district court permitted the government to proffer the testimony of Dr. Bowling that she suffered from senile dementia.

We, however, do not find that the district court abused its discretion, as requiring a witness to undergo a psychiatric examination is a significant intrusion on privacy and dignity. See United States v. Jackson, 576 F.2d 46, 49 (5th Cir. 1978) (noting that a psychiatric examination "may seriously impinge on a witness's right to privacy"). At the time of trial, Mrs. Dickson was eighty-six years old, residing in a nursing home, under the court-ordered guardianship of her granddaughter. Moreover, such an intrusion was unnecessary here, as there was an abundance of lay testimony regarding Mrs. Dickson's deteriorating condition.

Finally, the Cudas argue that the district court erred in sentencing them by including $750,000 that Mrs. Harvey purportedly lost in determining their offense level. This amount, however, was properly included, as the Cudas were convicted of a single mail fraud scheme, part of which included the venture in which Mrs. Harvey lost her money.

AFFIRMED.